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No. 01-1080

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TRANS UNION LLC,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

In its Petition for Writ of Certiorari, Trans Union LLC ("Trans Union") showed that the D.C. Circuit's judgment in this case warrants plenary review because it impermissibly expands *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), to create a new category of truthful "private" speech subject to diminished First Amendment protection and because it improperly creates a novel rule allowing intermediate First Amendment scrutiny to be satisfied by attributing to Congress a fictional determination that the legislature never made.

The D.C. Circuit held that Trans Union could state no First Amendment claim – without regard to whether target marketing lists contain publicly available information, or are used for solicitations by political and charitable organizations such as the Republican National Committee and United Way (C.A. App. 0841-46, 2376-77, 2376). Target marketing lists of names and addresses reflect such truthful (and unremarkable) information as the fact that an individual has a home mortgage or a bank card. There has never been any finding by Congress, the FTC, the D.C. Circuit, or any other governmental body that target marketing lists contain information that is intimate or embarrassing. Target marketing lists do not disclose credit performance data, such as whether and how consumers pay their bills. The fact that a consumer has a loan secured by a mortgage is already in the public domain, as the FTC itself has recognized in a related context. 16 C.F.R. § 313.3(p)(3)(iii)(1); 65 Fed. Reg. 33657 (2000). Thus, the Government's claim that such information "traditionally has not been put to public dissemination," Brief in Opposition (BIO) 19 n.9, is flatly wrong.

The FTC's ban on Trans Union's speech serves no important governmental interest, particularly when the statute simultaneously permits the disclosure of detailed credit performance information for *billions* of insurance and credit prescreening offers *every year*. The Government overlooks the salient point that prescreening involves not merely the disclosure of target marketing information, but also the release of *more*

detailed credit performance data. The supposed tailoring of the governmental scheme borders on the absurd.

1. The D.C. Circuit's Expansion of *Dun & Bradstreet* Warrants Review. Tellingly, the Government does not defend the D.C. Circuit's decision on its own terms. Instead, the Government contends that Trans Union's expression should be treated as "commercial speech": "[a]lthough petitioner's target-marketing lists do not themselves propose a commercial transaction," "they are used by many of petitioner's customers for the purpose of making their own commercial solicitations" and are thus "effectively a precursor to the classic kind of commercial speech that receives only a reduced level of constitutional protection." BIO 12.

Even if Trans Union's speech were treated as commercial expression, the FTC's ban would still be invalid under intermediate scrutiny. But the D.C. Circuit never adopted the Government's reasoning or suggested that the target marketing lists could be treated as commercial speech. Instead, the court of appeals relied solely on *Dun & Bradstreet* to conclude that "Trans Union target marketing lists thus warrant 'reduced constitutional protection.'" Pet. App. 13a (quoting *Dun & Bradstreet*, 472 U.S. at 762 n.8). In its order denying rehearing, the court reaffirmed its reliance on *Dun & Bradstreet*. Pet. App. 16a-17a. The Government's argument that the court was merely "[d]rawing an analogy to" *Dun & Bradstreet* (BIO 8) is revisionism, pure and simple. As the case comes to this Court, the *Dun & Bradstreet* issue framed by the court of appeals is clearly presented.

The Government does not deny that the D.C. Circuit's decision conflicts with *every other appellate court decision* regarding *Dun & Bradstreet*. *No other appellate court* has applied *Dun & Bradstreet* to create a new category of truthful

"private" speech lacking full First Amendment protection.[1]

The Government cites *Bartnicki v. Vopper*, 532 U.S. 514 (2001), as support for the D.C. Circuit's decision. BIO 17. But *Bartnicki* proves the opposite of what the Govemment claims. The D.C. Circuit created a category of truthful "private" speech entitled to diminished First Amendment protection. *Bartnicki* rejected precisely such a categorical approach. *See* 532 U.S. at 528 ("refus[ing] to answer categorically whether truthful publication may ever be punished consistent with the First Amendment"). To be sure, *Bartnicki* considered whether the communication in that case involved a matter of "public concern." 532 U.S. at 533, 534, 535. But this Court did so not to lower the applicable level of First Amendment scrutiny at the outset (as the D.C. Circuit did) but rather in the course of considering whether the federal and state wiretapping statutes could survive full First Amendment scrutiny. This Court never suggested that speech of purely private concern triggers anything less than full First Amendment scrutiny.

The Government attempts to distinguish this Court's

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[1] The Government maintains that the defamatory nature of the credit report in *Dun & Bradstreet* was irrelevant to the plurality's decision. BIO 15-16 n.7. That argument fails. The plurality there stated that "speech solely in the individual interest of the speaker and its specific business audience" "warrants no special protection *when – as in this case – the speech is wholly false and clearly damaging to the victim's business reputation.*" 472 U.S. at 762 (emphasis added). The *Dun & Bradstreet* plurality opined that there was no reason to extend the "actual malice" rule of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), to false statements that do not relate to matters of public concern. 472 U.S. at 762. Nothing in the plurality's opinion indicates that *truthful, nondeceptive* speech can be stripped of full First Amendment protection by deeming it a matter of "private" concern. Indeed, the *Dun & Bradstreet* plurality applied the decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which expressly rejected an attempt to extend the "actual malice" rule to all speech involving matters of "general or public interest," in part because of the difficulty of determining which communications "address issues of 'general or public interest' and which do not." 418 U.S. at 346.

decisions in *Smith v. Daily Mail*, 443 U.S. 97 (1979), *Landmark Communications v. Virginia*, 435 U.S. 829 (1978), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), by arguing that these cases involved matters of "public significance," while Trans Union's speech does not. BIO 18 & n.8. That argument simply proves the ipse dixit nature of the D.C. Circuit's decision. If the "public significance" test can be met by the name of a juvenile offender (*Daily Mail*), the names of certain judges under investigation (*Landmark*), and the names of local civil rights boycott violators who fear retaliation (*Claiborne Hardware*) – not to mention the name of a rape victim which under state law is not to be made part of the "public record" of a criminal case, *The Florida Star v. B.J.F.*, 491 U.S. 524, 536 (1989), or a parody stating that Rev. Jerry Falwell lost his virginity "during a drunken incestuous rendezvous with his mother in an outhouse," *Hustler Magazine v. Falwell*, 485 U.S. 45, 48 (1988), or sexually explicit images that appear to depict minors, *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002) – then how could the "public significance" test not be satisfied by speech that the Government concedes is integral to the purchasing decisions of millions of Americans and forms one of the key foundations of our information economy? If there were any ambiguity about the meaning of the "public significance" test, or about the implications of *Bartnicki*, such uncertainty would be a further reason to grant certiorari in order to clarify the important First Amendment principles at stake.[2]

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[2] There is no basis for the Government's claim that recognizing Trans Union's First Amendment rights would set a "sweeping and categorical" precedent. BIO 19. To the contrary: it is the D.C. Circuit's decision that is unprecedented. According First Amendment protection to the communication of target marketing lists would not immunize such activity from government regulation; it would simply require government regulations to satisfy the otherwise applicable level of constitutional scrutiny. And it would pose no obstacle to rules that do not restrict speech at all but merely prevent unauthorized access to credit records or help to ensure the accuracy of such information.

2. The Government's "Commercial Speech" Argument Provides An Additional Reason for Granting Review. The Government's claim that Trans Union's expression qualifies as commercial speech cannot be squared with the plurality opinion in *Dun & Bradstreet*, which emphatically denied that its holding "leaves all credit reporting subject to reduced First Amendment protection." 472 U.S. at 762 n. 8. "We also do not hold * * * that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech." *Id.*

The Court has held that whether speech "propose[s] a commercial transaction" is "the test for identifying commercial speech." *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 473-74 (1989) (holding that for-profit job counseling, tutoring, legal advice, and medical consultation in students' dormitory rooms consists of speech for profit, but does not satisfy the definition of commercial speech because it does not *propose* a commercial transaction); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993). By communicating names and addresses to its customers, Trans Union is not thereby advertising its services or otherwise proposing a commercial transaction. Rather, it is communicating information – a process that is the essence of speech.[3]

This Court has never suggested that speech is subject to diminished First Amendment scrutiny simply because it occurs in a commercial context. "Some of our most valued forms of fully protected speech are uttered for a profit." *Fox*, 492 U.S. at 482 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*)). The Government's theory is impossible to square with decisions like

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[3] The Government's claim that Trans Union is in effect proposing to sell "the X [names and addresses of individuals] at the Y price" (BIO 12) (citation omitted) describes hypothetical *advertising* of the target marketing lists but not the actual *communication* of the lists themselves. The actual transmission of the information contained in the lists does not "propose" anything.

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978) (rejecting argument that commercial speech doctrine allowed state to restrict corporation's political speech), *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 533-35 (1980) (utility bill inserts entitled to full First Amendment protection), or *Givhan v. Western Line Consol. School Dist*, 439 U.S. 410, 415-16 (1979) (First Amendment protections not reduced for speaker "who arranges to communicate privately . . . rather than to spread his views before the public" directly).

The Government's commercial speech argument would lead to anomalous results. Nearly all information could be said to be "a precursor to" "classic . . . commercial speech." BIO 12. Sellers use scientific studies, economic data, and other materials in designing and carrying out their advertising campaigns. The Government's contention that commercial speech includes expression within a speaker's "own financial interest" that lacks any "link[] . . . to any issue of broad public concern," BIO 11, would also eliminate full First Amendment protection for most business-to-business communication, as well as for much of the speech in which private citizens engage.

It is undisputed that Trans Union's target marketing lists are sometimes used to solicit contributions for charitable and political groups such as the Republic National Committee and the United Way. Under the Government's theory, the same speech by Trans Union would change from fully protected expression to commercial speech depending on the end use to which it was put by its recipient.

Hence, if anything, the Government's commercial speech argument demonstrates an additional reason to grant certiorari, in order to clarify the definition of "commercial speech." The decisions cited by the Government demonstrate the divergence of views in the lower courts:

• *Equifax Services, Inc. v. Cohen*, 420 A.2d 189 (Me. 1980), *cert. denied*, 450 U.S. 916 (1981) (cited BIO 12-13 n.4), treated

a statutory prohibition on the use or disclosure of certain types of truthful information in credit reporting as a commercial speech restriction but struck it down as "a direct content-based restraint on speech." *Id.* at 196. The D.C. Circuit held just the opposite. Pet. App. 18a-19a.

• In *U.D. Registry, Inc. v. State*, 40 Cal. Rptr.2d 228, 230 (Cal. 2d Dist. 1995), *review denied*, 1995 Cal. LEXIS 5075 (Cal. 1995), *cert. denied*, 516 U.S. 1074 (1996) (cited BIO 14 n.6), the court held that credit reports are fully protected speech under the First Amendment rather than commercial speech. The court specifically rejected *Dun & Bradstreet. Id.* at 230 n.1. Again, the D.C. Circuit held precisely the opposite.[4]

3. The D.C. Circuit's New Rule of "Imputed Congressional Findings" Warrants Review. The Government attempts to rehabilitate the D.C. Circuit's decision by re-arguing the intermediate scrutiny standard as it applies in this case. Remarkably, the Government never once addresses the D.C.

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[4] The Government speculates that the California Supreme Court, which denied review in *U.D. Registry*, might change its mind in a subsequent case. BIO 14 n.6. In the meantime, *U.D. Registry* represents the definitive view of the California courts on the matter, and Trans Union faces the very real possibility that it will be governed by one rule of law in the pending California state court action and a different rule in federal court. *See* Cert. Petition 25. The Government also relies on two cases not involving credit reports which similarly underscore the need for this Court's review:

• *United Reporting Publ'g Corp. v. California Highway Patrol*, 146 F.3d 1133, 1136 (9th Cir. 1998), *rev'd*, 528 U.S. 32 (1999) (cited BIO 12-13), involved the release of arrest records by the government and opined that the definition of "commercial speech" is "not . . . settled" and is "'subject to doubt.'"

• *U S WEST, Inc. v. FCC*, 182 F.3d 1224, 1233 n.4 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000) (cited BIO 13), concerned the use of telecommunications data for marketing purposes and observed that the commercial speech definition is "admittedly unclear" and that "the [Supreme Court] has not offered any nuanced distinctions" in its formulations of the definition.

Circuit's central holding that intermediate scrutiny was satisfied, despite the FTC's disparity in treatment between prescreening and target marketing lists, because "Congress *apparently believes* that people are more willing to reveal personal information in return for guaranteed offers of credit than for catalogs and sales pitches." Pet. App. 22a (emphasis added).

Instead, the Government advances a misleading description of the prescreening exception by implying that it entails the disclosure merely of "consumers' names and addresses" and "the same information" involved in target marketing lists. BIO 22, 23. The Government is incorrect. Under 15 U.S.C. § 1681b(a)(3)(A), (C), and (c)(1)(B)(i), prescreening offers involve the disclosure of detailed credit performance information, including bill payment history. This information is much more detailed than the data contained in target marketing lists. It is no answer to assert – as the Government does, citing no evidence or congressional findings – that "Congress has concluded" that the peoples' calculus of costs and benefits is different for prescreening and targeting marketing. BIO 23. There is no evidence in the legislative or administrative record to support the Government's assertion, which is essentially the same fail-safe deferential approach as that employed by the D.C. Circuit. Indeed, the Government's argument is undermined by its own claim that Congress acted to "restrict" prescreening "to some degree" in 1996. BIO 24. If that is true, there is even less reason to impute to Congress a fictional finding that opt-out is a sufficient protection for prescreening but not for target marketing.

The Government insists that it may rely on "simple common sense" (BIO 22) (citation omitted), but the disparity in the FTC's treatment of prescreening and target marketing reflects anything but "common sense." It is utterly paradoxical. And the only available congressional and administrative findings undermine the tailoring of the governmental scheme. *See* Cert. Pet. 26-27. The Government cannot point to a single reported decision by

any court that has found intermediate scrutiny satisfied in such circumstances.[5]

4. This Case Presents Important Issues Warranting this Court's Review. In the end, the Government seeks to convey the impression that this case involves technical issues with no implications beyond the effects on the immediate parties. Nothing could be further from the truth. The decision below has already been applied in other FCRA cases. *FTC v. Citigroup Inc.*, 2001 U.S. Dist. LEXIS 22149, *13-14 (N.D. Ga. Dec. 27, 2001). This case is the logical successor to *Los Angeles Police Dept. v. United Reporting Corp.*, 528 U.S. 32 (1999), and presents important questions about the relationship between privacy rights and the First Amendment that this Court did not resolve in *LAPD*. Moreover, the Government studiously ignores six *amici curiae* briefs in support of petitioner:

• The Coalition for Sensible Public Records Access (CSPRA) notes that "[t]he D.C. Circuit's decision threatens not only [Trans Union's] expression, but also the expression of the many businesses and organizations that rely on [its] target marketing lists, and myriad other valuable uses of accurate, lawfully obtained information that undergird the information economy." CSPRA Br. 2.

• The Information Services Executive Council of the Direct Marketing Association (DMA) demonstrates that this case

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[5] *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995) (cited BIO 21), did not involve speculation but pointed to extensive evidence "noteworthy for its breadth and detail" that was based on a two-year empirical study. *Id.* at 627. Commentators have noted that "the D.C. Circuit panel [in *Trans Union*] required much less agency justification that the privacy interest being advanced was a substantial state interest than was required" in other cases. Andrew S. Krulwich and Bruce L. McDonald, *The Vulnerability of HIPPAA Regulations to First and Fourth Amendment Attack: An Addendum to "Evolving Constitutional Privacy Doctrines Affecting Healthcare Enterprises,"* 56 FOOD DRUG L.J. 281, 296 (2001).

involves a "matter of immense public importance" and that the "threatened negative impact" of the decision below "is both broad and substantial." "Not only does this ban threaten direct marketing's important role in the national economy, it threatens to remove substantial economic efficiencies and ease of service enjoyed by consumers. It also threatens the economic viability of non-profit organizations (including charities and political entities) . . . ." DMA Br. 4-5.

• The Consumer Data Industry Association (CDIA) observes that the decision below "will affect the constitutional protection afforded consumer reporting agencies' speech beyond the facts of the *Trans Union* decision." CDIA Br. 5.

• The Washington Legal Foundation (WLF) explains that the D.C. Circuit's decision "carves out a broad category of speech deemed of lesser importance," "threatens to disrupt large segments of American commerce, and authorizes suppression of large amounts of speech – both commercial and (as here) noncommercial in character – not previously subject to any form of governmental regulation." WLF Br. 5-6.

• The Progress and Freedom Foundation (PFF) shows that "[t]he Court should grant the Trans Union petition to ensure that First Amendment interests receive proper protection in this era in which courts increasingly will confront cases involving speech regulation in the name of privacy." PFF Br. 5.

• The Competitive Enterprise Institute (CEI) demonstrates that the D.C. Circuit's judgment conflicts with decisions of this Court and of other appellate courts. CEI Br. 4-9.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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